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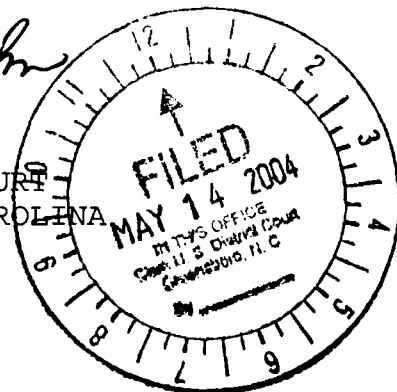
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IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



CARMELITA SWANN; and APRIL  
FAIL,

Plaintiffs,

v.

ROADWAY EXPRESS, INC.,

Defendant.

CIVIL NO. 1:02CV01053

MEMORANDUM OPINION

BULLOCK, District Judge

Plaintiffs Carmelita Swann ("Swann") and April Fail ("Fail") have brought this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), and the North Carolina Equal Employment Practices Act, N.C. Gen. Stat. § 143-422.1 et seq. Both Plaintiffs bring claims of sex discrimination, and Swann brings a claim of race discrimination. Defendant Roadway Express, Inc. ("Roadway") timely removed the action, and on November 13, 2003, the court entered partial judgment on the pleadings on Swann's claims for constructive discharge under North Carolina law. This matter is now before

the court on Roadway's motion for summary judgment. Also pending before the court is Plaintiffs' motion to strike certain exhibits supporting Roadway's summary judgment motion. For the following reasons, the court will grant Roadway's motion for summary judgment and deny Plaintiffs' motion to strike as moot.

#### FACTS

From 1997 to 2002, Swann and Fail were employed as mechanics at Roadway's Winston-Salem garage. Plaintiffs inspected, tested, and repaired Roadway tractors. Fail is white, and Swann is African-American. Both Plaintiffs are female.

Plaintiffs allege that throughout their employment at Roadway, they were treated less favorably than their male co-workers with respect to work assignments and opportunities. As evidence of their discriminatory treatment, they allege that one of their supervisors, Benny Huff ("Huff") repeatedly wrote critiques in red on their work orders such as "please see me for help," and "punching needs to improve." (Br. Supp. Def.'s Mot. Summ. J., Ex. 6, Dep. of April Fail at 74.) In addition, Huff allegedly gave each Plaintiff onerous work assignments that normally took two workers to complete.

Swann contends that the Garage Manager Peter Navarro ("Navarro") improperly asked her to submit an obituary from her

grandmother's funeral to substantiate Swann's request for funeral leave. Swann believes that no male employees provided documentation to obtain funeral leave. Swann also alleges Roadway supervisors discriminated against her by counseling her for her cumulative absences from work in 2002 and by requiring her to resubmit Family Medical Leave Act ("FMLA") paperwork that she had not completed properly.

In addition to alleging discriminatory treatment, Plaintiffs claim that their male co-workers subjected them to a hostile work environment. The problems apparently began on September 1, 2001, when Fail and a male employee, Robert Ballard ("Ballard"), complained about an offensive song being played on the shop radio. In response to Fail's and Ballard's concerns, Navarro ordered that the shop radio was not to be tuned to the radio station playing the offensive song. Navarro also posted a notice in the work area regarding the radio station. Plaintiffs admit that the station was changed following Navarro's order, but contend that they continued to hear the song at work. However, neither Plaintiffs nor Ballard made any further complaints to Roadway management about the radio stations being played.

On September 14, 2001, Swann and another co-worker, Ron Lane ("Lane"), squabbled over the volume of the radio. Lane unplugged the radio and reached for Swann's hand to prevent her from plugging it into the outlet. Swann then complained to Navarro

about Lane's conduct. Shortly after the radio incidents, Plaintiffs noticed that their co-workers refused to take breaks or eat lunch with them or Ballard. Plaintiffs believe that the ostracism they experienced was in retaliation for their complaints about the shop radio. Fail further contends that one Roadway supervisor chastised her for complaining about the radio because Fail had offended her co-workers.

In December 2001, Fail discovered rags on her toolbox that had been arranged in the form of a penis. Fail reported this incident to Navarro. Fail also told Navarro that a few years earlier, she had seen co-worker Kevin Berrier ("Berrier") make a similar object but did not file a complaint with Roadway management at that time. Once Fail told Navarro about the rag object, Roadway immediately began an investigation. Navarro called a meeting of all the employees on Fail's shift and reaffirmed Roadway's "zero tolerance" harassment policy. He read a memorandum stating that if Roadway could identify the person responsible for the rag object, the company would dismiss that person and would prosecute him if he had acted with the intent to harass or intimidate. This memorandum was posted on the employees' breakroom door. The union steward also interviewed Roadway employees about the rag object. Though the steward learned that employees on an earlier shift had created the

object, the steward neglected to report this information to Roadway management.

A few weeks after the rag object incident, Fail discovered grease in her jacket when she arrived at work. Fail told Navarro and implicated Berrier as the person responsible for the rag object and the grease. Consequently, Roadway terminated Berrier for violating its harassment policy. Plaintiffs allege that after Berrier was terminated, Roadway employees began a collection of funds to compensate Berrier for the time he was out of work.

The union filed a grievance on Berrier's behalf, requesting that Berrier be suspended without pay for approximately one week and subsequently reassigned to a different shift than Fail. Navarro presented the proposal to Fail and asked if it was sufficient to rectify the harassment. After some thought, Fail agreed to the proposal. She signed a statement acknowledging her consent to Berrier's return, and Berrier signed a statement affirming that he would not retaliate against Fail again. Plaintiffs do not allege that Berrier acted inappropriately after his reinstatement.

Plaintiffs contend that the next instance of allegedly harassing conduct occurred in March 2002.<sup>1</sup> Fail claims that

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<sup>1</sup>Fail also alleges that during her tenure at Roadway, someone photographed her bending over a truck and placed the

(continued...)

someone beat on the side of the trailer she was fixing and yelled "Bitch, go home." Fail also claims that someone hid her tools so she could not finish her job. She admits that she does not know who hid the tools and did not see anyone take the tools. She also does not know who yelled at her, but contends that the voice she heard belonged to a male. Fail never reported these events to Roadway.

Swann alleges that she also experienced harassing conduct in March when she opened her locker and discovered that her coveralls had been burned. Swann believed this action was intentional and reported it to Navarro. An investigation revealed that the coveralls were burned when janitors used a cutting torch to remove the legs from lockers in an area they were remodeling. Swann admits that the janitor who burned the coveralls apologized and told her he would not have torched the lockers had he known her clothing was inside.

Finally, both Plaintiffs allege that they found a rope shaped like a noose in the women's restroom on March 20, 2002, when they reported to work. Near the end of their shift, Plaintiffs showed the rope to a supervisor, who in turn advised Navarro. Navarro obtained statements from Swann and Fail regarding the rope and began an investigation. As part of the

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<sup>1</sup>(...continued)  
photograph on her toolbox. She cannot remember the dates when the photograph was taken or given to her.

investigation, Navarro interviewed supervisors and a non-employee driver who used the women's restroom during Plaintiffs' shift. The supervisors stated that Fail and Swann had not reported the incident to them, and the driver told Navarro that she had not seen the rope in the restroom.

On the same day that Plaintiffs found the rope, all employees on Plaintiffs' shift received workplace harassment retraining.<sup>2</sup> Roadway also began locking the door to the women's restroom and provided keys only to the female employees using that restroom. Four days after Plaintiffs found the rope, one of Roadway's assistant vice presidents came from Atlanta to investigate Plaintiffs' claim and interview Plaintiffs about their concerns.

Shortly thereafter, on March 28, 2002, Fail's supervisor asked her to locate a trailer in the Roadway yard and replace its license tag. Because Fail could not find the trailer, she returned to the shop and asked Swann to accompany her to the yard to search for the trailer. Fail did not obtain permission to bring Swann. Plaintiffs' supervisor noticed that Swann was not at her work area and saw Swann riding with Fail in a Roadway

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<sup>2</sup>Roadway employees attend annual sexual harassment training sessions that address hostile work environments. Plaintiffs admit that they have undergone this training and have received a copy of Roadway's "zero tolerance" sexual harassment policies. (Br. Supp. Def.'s Mot. Summ. J., Ex. 5, Dep. of Carmelita Swann at 98; Br. Supp. Def.'s Mot. Summ. J., Ex. 6, Dep. of April Fail at 296.)

truck. The supervisor confronted Fail about taking Swann from her work area and, in response, Fail threw the license tag onto a nearby picnic table and began to walk away. Upon being cautioned about throwing the tag, Fail picked up the tag, handed it to the supervisor, and clocked out for the day, well before the end of her shift. Fail admits that she walked off the job (Fail Dep. at 387), but contends that she did so because she feared for her safety. The next morning, Navarro contacted Fail and told her she had been terminated for abandoning her job pursuant to Article 42, Section 4 of the union contract. That day, Plaintiffs filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Swann continued to work at Roadway until August 21, 2002, when she resigned.

## DISCUSSION

### I. Standard of Review

Summary judgment must be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the burden of persuasion on the relevant issues. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party may survive a motion for summary judgment by producing "evidence from which a [fact finder] might return a

verdict in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). When the motion is supported by affidavits, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(e); see also Cray Communications, Inc. v. Novatel Computer Sys., Inc., 33 F.3d 390, 393-94 (4th Cir. 1994) (moving party on summary judgment motion can simply argue the absence of evidence by which the non-movant can prove her case). In considering the evidence, all reasonable inferences are to be drawn in favor of the non-moving party. Anderson, 477 U.S. at 255. However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [fact finder] could reasonably find for the plaintiff." Id. at 252.

## II. Statute of Limitations

A party alleging a Title VII violation must file a charge of discrimination within 180 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1); Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 345 (4th Cir. 1994). Acts of discrimination that fall outside the 180 days preceding the filing of the charge are time-barred. See Beall v. Abbott Labs., 130 F.3d 614, 620 (4th Cir. 1997). In this case, Plaintiffs filed their EEOC charges on March 29, 2002. Thus, Plaintiffs'

claims must be based on conduct occurring after September 30, 2001 to be timely.

Two of Plaintiffs' allegations occurred before the 180-day period at issue: the incident involving the offensive song on the shop radio, and Swann's claim regarding Lane's unplugging the radio. Plaintiffs do not contest that Swann's allegation regarding Lane is untimely. However, Plaintiffs argue that the radio song incident is timely because the song continued to be played on the radio throughout Plaintiffs' tenure at Roadway. Plaintiffs characterize the repeated airplay of the song as a continuing violation.

The continuing violation theory allows the court to consider untimely claims related to a timely incident as a "'series of separate but related acts' amounting to a continuing violation." Id. at 620 (quoting Jenkins v. Home Ins. Co., 635 F.2d 310, 312 (4th Cir. 1980) (per curiam)). To rely on the continuing violation theory, Plaintiffs must demonstrate that "an actual violation has occurred within [the] requisite time period." Woodard v. Lehman, 717 F.2d 909, 915 (4th Cir. 1983). A single offensive song played periodically on a radio station in the workplace is not an actionable violation of Title VII. See Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996) ("Title VII was not designed to create a federal remedy for all offensive language and conduct in the workplace."). Because

Plaintiffs cannot show that the September 1, 2001, radio incident is part of a series of acts demonstrating a continuing violation, this allegation is time-barred.

### III. Hostile Work Environment

Plaintiffs allege that their co-workers' conduct created a sexually and racially hostile work environment. To state a claim for hostile work environment under Title VII, Plaintiffs must demonstrate that: (1) they experienced unwelcome harassment; (2) the harassment was based on race or gender; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; (4) there is some basis for imputing liability to the employer. See Bass v. E.I. DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2003). Specifically, Plaintiffs assert that Swann's burned coveralls, their co-workers' refusal to socialize with them, the hiding of tools and yelling "bitch go home," the photograph of Fail found on her toolbox, the rag object, the grease in Fail's jacket, and the rope noose are all examples of the hostile work environment Plaintiffs experienced. Though this conduct likely was unwelcome and uncomfortable for Plaintiffs, the allegations do not state a claim for hostile work environment.

As an initial matter, Plaintiffs cannot demonstrate that the burned coveralls or the co-worker ostracism was based on their

sex. An employee suffers harassment "based on sex" if "'but-for' the employee's sex, he or she would not have been the victim of the discrimination." Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 142 (4th Cir. 1996). Swann claims that the coveralls incident was based on sex because the torched lockers were located in the women's restroom. However, this area was undergoing renovation, and Swann offers no evidence to demonstrate that the janitors intentionally burned Swann's coveralls while working in the restroom. Instead, Swann admits that the janitor responsible apologized and stated that he would not have torched her locker had he known her clothing was inside. (Br. Supp. Def.'s Mot. Summ. J., Ex. 5, Dep. of Carmelita Swann at 399-400.) There is no evidence to demonstrate that the janitor's apology was insincere or that he harbored discriminatory animus against her. Because Swann fails to show that the coveralls incident was anything more than an accident, this allegation cannot be used to sustain a hostile work environment claim.

Similarly, Plaintiffs complain that they were ostracized and isolated at work. However, they believe that their co-workers treated them this way because they had complained about the radio, not because they were female. (Fail Dep. at 241; Swann Dep. at 315-17.) Plaintiffs admit that their co-workers also ostracized Ballard, the male employee who had complained with

Fail about the offensive radio song. (Fail Dep. at 234; Swann Dep. at 342-43.) Thus, Plaintiffs cannot show that the ostracism they experienced was based on sex.

Assuming without deciding that Plaintiffs' other allegations are sufficiently severe or pervasive to meet the third prong of the analysis, Plaintiffs' claim for hostile work environment still fails on the fourth prong. To hold an employer liable for sexual harassment by a co-worker, a plaintiff must show that the employer knew or should have known about the harassment and failed to take effective action to stop it. Ocheltree v. Scollon Productions, Inc., 335 F.3d 325, 333-34 (4th Cir. 2003). In this case, Fail never told Navarro or any other Roadway supervisor about the "bitch go home" comment, the hidden tools, or the photograph she found on her toolbox. Fail cannot prove that some basis exists for holding Roadway liable for these instances because Roadway did not know or have reason to know of their occurrence. See Hartsell v. Duplex Prods., Inc., 123 F.3d 766, 774 n.7 (4th Cir. 1997); see also Hadrosek v. Paging Network, Inc., 155 F.3d 559, 1998 WL 390579, at \*\*5 (4th Cir. June 26, 1998) (unpublished) (affirming district court finding that employer was not liable on plaintiff's hostile work environment claim because plaintiff "failed to report to her supervisors the incidents that she now alleges were directed toward her . . . .

[Plaintiff's] own inaction concerning [the] incidents undercut her employer's ability to remedy any problems." ).

Further, Plaintiffs cannot show that Roadway failed to take prompt and effective action to address the rag object, greased jacket, and rope noose. Once Fail reported the rag object, Navarro began an investigation that included interviewing employees and notifying the union steward. He also called a meeting of the employees on Fail's shift to reaffirm the company's "zero tolerance" harassment policy. During the meeting, Navarro read and posted a memo regarding dismissal of the person responsible for the rag object. Thereafter, Plaintiffs did not complain that their co-workers engaged in any other sexually offensive conduct.

Likewise, when Fail told Navarro about the grease she found in her jacket, Navarro investigated and ultimately terminated Berrier, the employee responsible for that act. Though Plaintiffs claim that Fail felt compelled to agree to Berrier's reinstatement, Berrier returned to his position only after Fail consented in writing. When Berrier returned to work, Roadway assigned him to a different shift and obtained Berrier's written affirmation that he would not retaliate against Fail again. Plaintiffs do not complain that Berrier acted inappropriately after Roadway took these remedial measures.

Finally, all evidence indicates that Roadway management took the rope noose allegation seriously and acted promptly to ensure that such a threat did not reoccur. The same day that Plaintiffs found the rope, Roadway employees received workplace harassment retraining. Navarro began an investigation, and a vice president from the regional office interviewed Plaintiffs about the rope incident and the other incidents of harassment they alleged. After Plaintiffs found the rope in the women's restroom, Roadway began locking the restroom and providing keys only to female employees using that restroom. Plaintiffs do not allege that other acts of co-worker harassment occurred after Roadway addressed the rope incident.

Upon learning of the rag object, the grease, and the rope noose, Roadway responded promptly and adequately to stop the harassment Plaintiffs alleged. See Mickels v. City of Durham, 183 F.3d 323, 329-30 (4th Cir. 1999) (affirming district court finding that employer's remedial responses to sexual harassment complaint were adequate where employer reprimanded and reassigned employee responsible, warned other employees about workplace harassment, conducted an investigation, and received no more reports of harassing conduct after remedial actions were taken); Spicer v. Commonwealth of Virginia, Dep't of Corr., 66 F.3d 705, 710-11 (4th Cir. 1995) (determining that employer's remedial action was adequate where on the same day the complaint was

received employer admonished those responsible for inappropriate remarks, conducted training sessions on sexual harassment, and did not receive further complaints of harassment). As a result, Plaintiffs cannot prevail on their claims of hostile work environment based on sex or race.

#### IV. Disparate Treatment Claims

Plaintiffs contend that their supervisors discriminated against them by treating male mechanics more favorably. As examples of the discrimination they allege, Plaintiffs reference their work orders and work assignments, Swann's documentation of her grandmother's funeral, Swann's attendance counseling, and Swann's delay in obtaining FMLA leave. Plaintiffs may pursue a claim for sex discrimination under the framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).<sup>3</sup> To do so, Plaintiffs first must state a prima facie case of discrimination by showing that: (1) they are members of a

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<sup>3</sup>The court recognizes that, despite a lack of direct evidence of discrimination, Plaintiffs also could have used the mixed-motive theory as the method of proof by which to state their claims. A plaintiff proceeding under the mixed-motive theory must present sufficient direct or circumstantial evidence for a reasonable jury to conclude that race, color, religion, sex, or national origin was a motivating factor for any employment practice. See Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003); Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 284-85 (4th Cir. 2004). However, because Plaintiffs have chosen to proceed only under the McDonnell Douglas burden-shifting framework, the court will not consider their claims under the mixed-motive theory.

protected class; (2) they were qualified for their jobs and their performance was satisfactory; (3) they suffered an adverse employment action; (4) they were treated less favorably than similarly situated employees outside the protected class. See id.; Taylor v. Virginia Union Univ., 193 F.3d 219, 233 (4th Cir. 1999) (en banc), abrogated on other grounds; Hughes v. Bedsole, 48 F.3d 1376, 1383 (4th Cir. 1995). If Plaintiffs succeed in presenting a prima facie case, the burden of production shifts to Roadway to demonstrate a legitimate non-discriminatory reason for the alleged unlawful action. See McDonnell Douglas, 411 U.S. at 802. If Roadway does so, Plaintiffs must prove that the reason given was a pretext and that Roadway intentionally discriminated against Plaintiffs because of their sex. Id. at 804; Mackey v. Shalala, 360 F.3d 463, 469 (4th Cir. 2004) ("Under the McDonnell Douglas framework, in order to survive a motion for summary judgment, the plaintiff must have developed some evidence on which a juror could reasonably base a finding that discrimination motivated the challenged employment action.").

Each of Plaintiffs' disparate treatment allegations suffers a crucial defect fatal to establishing a prima facie case: none of Roadway's alleged discriminatory conduct constitutes an adverse employment action. For purposes of Title VII, an adverse employment action is an action that actually adversely affects a term, condition, or benefit of employment. Von Gunten v.

Maryland, 243 F.3d 858, 869 (4th Cir. 2001). Adverse employment actions do not include "interlocutory or mediate decisions having no immediate effect upon employment conditions," Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981), or "trivial discomforts endemic to employment." Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

In this case, Plaintiffs' allegations are little more than trivial discomforts and inconveniences common to the working environment. Supervisor Huff's critiques on Plaintiffs' work orders do not constitute adverse employment actions because Plaintiffs did not suffer any loss of pay, benefits, or status as a result.<sup>4</sup> See Von Gunten, 243 F.3d at 867-68 (reasoning that a negative performance evaluation that did not jeopardize the terms or conditions of the plaintiff's employment was not an adverse employment action).

Similarly, though supervisor Huff may have given Plaintiffs less desirable work assignments, these assignments did not amount to a downgrading of Plaintiffs' positions or subject Plaintiffs to significantly more dangerous conditions than their male

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<sup>4</sup>This claim also fails on other grounds. For example, Plaintiffs cannot demonstrate that the way they processed their work orders was satisfactory. Fail admits that Huff may have written on her work orders because "I could never figure out how I was supposed to punch" (Fail Dep. at 76). Moreover, Plaintiffs cannot show that male co-workers were treated more favorably in this regard because Huff wrote comments on Robert Ballard's work orders as well. (Fail Dep. at 78.)

co-workers.<sup>5</sup> Consequently, Plaintiffs have not shown that their work assignments were adverse employment actions. See id. at 868 (affirming district court finding that plaintiff's reassignment to "less appealing" working conditions did not constitute an adverse employment action); Gilliam v. Principi, 2003 WL 2006844, at \*8 (M.D.N.C. Apr. 28, 2003) (unpublished) (holding that "assignment to an unwanted job duty without financial repercussions is not an 'adverse employment action'").

With regard to her request for funeral leave, Swann contends that Roadway did not require documentation to excuse other employees from work. Roadway maintains that Navarro requested the documentation to permit Swann to take paid funeral leave as an exception to the union policy, which allowed paid leave only for death of an immediate family member. Though Plaintiffs question Navarro's motives and Swann asserts that she never asked for paid leave, the ultimate outcome of this incident was that Swann's absence from work was excused. Thus, the request did not alter any of Swann's terms or benefits of employment. See Von Gunten, 243 F.3d at 869 (noting that employer's

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<sup>5</sup>Plaintiffs' allegation about work assignments also fails to meet the fourth prong of their prima facie case, as Plaintiffs' admissions demonstrate that their male counterparts also were given difficult or unwanted tasks. (Fail Dep. at 305 (explaining that Huff frequently assigned male co-worker Alvin Hicks three undesirable "heavy clutch" jobs while giving other workers, including Plaintiffs, only one heavy clutch job)); (Fail Dep. at 311 (acknowledging that Robert Ballard was transferred from a job in the shop to a less desirable job in the lane)).

"hyper-scrutinizing" of sick leave and requesting documentation for all prior and future sick leave did not adversely affect plaintiff's employment).

Finally, Plaintiffs do not contest Roadway's refutation of the attendance counseling or FMLA allegations. Even if Plaintiffs had disputed the dismissal of these claims, their arguments would fail. Pursuant to Roadway policy, supervisors counseled employees with excessive absences spanning a three-month period. Swann concedes that she was absent from work five days and left work early four days within two and one-half months. Though Swann was counseled for her absenteeism, she was never disciplined, suspended, or docked pay. Moreover, Roadway has provided uncontested evidence that Swann was not singled out under this policy: five other employees were counseled for their absences in 2002, and eight employees received attendance counseling in 2001. Because Swann has no evidence that this counseling resulted in an adverse employment action and that other male or white employees were exempt from this policy, this claim cannot survive. See id. ("[T]erms, conditions, or benefits of a person's employment do not typically, if ever, include general immunity from the application of basic employment policies or exemption from . . . disciplinary procedures."); Newman v. Giant Food, Inc., 187 F. Supp. 2d 524, 528-29 (D. Md. 2002) (concluding that counseling employee received for late

arrivals was not adverse employment action because employee suffered no consequences affecting his employment).

Swann's allegations concerning FMLA leave also lack merit. Swann's FMLA leave was delayed not because of discriminatory animus but because she failed to complete the requisite paperwork properly. There is no evidence that Roadway employees of a different sex or race could obtain FMLA leave with incomplete paperwork. In short, none of Plaintiffs' allegations demonstrate that Swann or Fail suffered an adverse employment action. Because Plaintiffs cannot establish a prima facie case of discrimination, their disparate treatment claims will be dismissed.

#### V. Retaliation

Under Title VII, an employer is prohibited from discriminating against an employee in retaliation for the employee's opposition to an unlawful employment practice. See 42 U.S.C. § 2000e-3(a). To establish a prima facie case of retaliation, Plaintiffs must prove that: (1) they engaged in protected activity; (2) an adverse employment action was taken against them; (3) there was a causal link between the adverse employment action and the protected activity. Mackey, 360 F.3d at 469. If Plaintiffs present a prima facie case of retaliation, their claims are subject to the same burden-shifting analysis as

their disparate treatment claims. See Part IV, supra; Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 271 (4th Cir. 2001). In their complaint, Plaintiffs contend that they experienced retaliation, but it is unclear which allegations they believe state a retaliation claim. Unfortunately for Plaintiffs, none of their allegations can sustain a retaliation claim.

Plaintiffs' complaints to management are sufficient to meet the first prong of a prima facie case; namely, that Plaintiffs engaged in protected activity under Title VII. See Bryant v. Aiken Reg'l Med. Ctrs., Inc., 333 F.3d 536, 543-44 (4th Cir. 2003). However, Plaintiffs cannot show that any of their allegations are sufficient to meet the second prong of the analysis. As stated above, Plaintiffs have failed to offer evidence that the alleged acts of their supervisors resulted in adverse employment action. See Part IV, supra. Likewise, co-worker ostracism may be uncomfortable and uncivil, but such behavior does not constitute an adverse employment action. See Matvia, 259 F.3d 271-72. Finally, the other alleged retaliatory acts (such as the rag object and the greased jacket) do not amount to an adverse employment action because Roadway did not retaliate against Plaintiffs. Instead, Roadway took prompt and effective measures to address all of Plaintiffs' complaints. See Part III, supra; Wilson v. S. Nat'l Bank of North Carolina, 1996 U.S. App. LEXIS 19927, at \*13 (4th Cir. August 8, 1996)

(unpublished) (affirming district court conclusion that Plaintiff could not prove adverse employment action based on co-worker conduct because employer took prompt remedial measures to stop co-worker harassment).

In addition to bringing the retaliation claims above, Fail contends that the circumstances surrounding her termination prove Roadway retaliated against her. However, Fail concedes that she walked off the job after being admonished for taking Swann away from her work area. Further, in her deposition, Fail explains that she left because "I wasn't going to let them yell at me anymore." (Fail Dep. at 389.) After Fail left, she did not attempt to call Navarro to explain the situation and did not protest when Navarro called the next morning and told her she was fired because she quit.

This evidence indicates that Fail's separation from employment with Roadway was her choice. "[W]hen an employee voluntarily quits under circumstances insufficient to amount to a constructive discharge, there has been no 'adverse employment action.'" Hartsell, 123 F.3d at 775. However, Fail argues that "the most highly disputed factor" in the case is whether she abandoned her job or left momentarily because she felt intimidated and feared for her safety. (Pls.' Br. Opp'n Def.'s Mot. Summ. J. at 11.) Taking these assertions in the light most favorable to Fail, Fail states a prima facie case of retaliation:

she complained about the allegedly hostile work environment, then was terminated within weeks of her complaints. See Tinsley v. First Union Nat'l Bank, 155 F.3d 435, 443 (4th Cir. 1998) (stating that closeness in time between protected activity and adverse employment action is sufficient to demonstrate causality for prima facie case of retaliation).

Though Fail may be able to show each element of her prima facie case, Roadway has a legitimate non-discriminatory reason for discharging Fail. When Fail walked off the job without permission, she violated the union contract governing her employment. Fail has no evidence to show that other employees who left work without permission were not terminated or that Roadway's decision to discharge Fail for violating union policy was a pretext to eliminate female employees. See Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 299 (4th Cir. 2004) (affirming district court grant of summary judgment for employer on retaliation claim because plaintiff admitted that she committed the infractions alleged against her, could not show that her supervisor overlooked similar infractions by other employees, and conceded that she would have been fired for her errors even if she had not engaged in protected activity); Banks v. Jefferson-Smurfit, 176 F. Supp. 2d 499, 508 (M.D.N.C. 2001) (finding that employer had a legitimate non-discriminatory reason for terminating plaintiff who went home without permission in

violation of the company's collective bargaining agreement). Consequently, Fail cannot establish a claim for retaliatory discharge.

#### VI. Constructive Discharge

Swann contends that the alleged race and sex discrimination she experienced at Roadway culminated in her constructive discharge. To state a claim for constructive discharge, Swann must prove that Roadway "deliberately made her working conditions 'intolerable in an effort to induce [her] to quit.'" Matvia, 259 F.3d at 272 (quoting Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1354 (4th Cir. 1995)) (alteration in original). To demonstrate intolerability, Swann must prove that a reasonable person in her position would have felt forced to resign. See Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 244 (4th Cir. 1997).

Swann cannot proffer any evidence indicating that Roadway intended to make her working conditions onerous. Instead, the facts show that Roadway responded quickly and effectively to alleviate Plaintiffs' workplace concerns. See Part III, supra. Further, Swann fails to establish that her working conditions were intolerable. Significantly, Swann did not report any harassing conduct or discriminatory treatment from April 2002 (after Fail was discharged) to August 2002, when she resigned.

Navarro states that during that time, Swann had expressed no new concerns and Roadway was happy with her performance. (Br. Supp. Def.'s Mot. Summ. J., Ex. 8, Dep. of Peter L. Navarro at 24-25). Swann's willingness to remain at Roadway for months after the alleged harassment is "fundamentally at odds with someone who finds [her] working conditions so intolerable that [she] feels compelled to resign." Gilliam, 2003 WL 2006844, at \*11 (finding that plaintiff who submitted a resignation letter stating his intention to continue working for eight more weeks did not show his working conditions were intolerable); see also Jones v. Greenville Hosp., 166 F.3d 1209, 1998 WL 823481, at \*\*3 (4th Cir. Nov. 30, 1998) (unpublished) (affirming dismissal of plaintiff's constructive discharge claim under the Americans with Disabilities Act because "the timing of the resignation . . . defeats [plaintiff's] claim"). Swann cannot prevail on this claim.

#### VII. NCEEPa Claims

Finally, Plaintiffs allege that Roadway's actions constitute violations of the North Carolina Equal Employment Practices Act, N.C. Gen. Stat. § 143-422.1 et seq. ("NCEEPa"). The NCEEPa provides that "[i]t is the public policy of [North Carolina] to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or

abridgment on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ fifteen or more employees." N.C. Gen. Stat. § 143-422.2. Plaintiffs do not specify which of their allegations state a claim under NCEEPA.<sup>6</sup> However, "North Carolina courts and federal courts applying North Carolina law have . . . [found] repeatedly that no private cause of action exists for retaliation, hostile work environment, disparate treatment, or constructive discharge in violation of public policy." Jones v. Duke Energy Corp., 43 Fed. Appx. 599, 2002 WL 1821979, at \*\*1 (4th Cir. Aug. 9, 2002) (unpublished) (citations omitted); Mullis v. Mechanics & Farmers Bank, 994 F. Supp. 680, 687-88 (M.D.N.C. 1997). Thus, the court will grant summary judgment for Roadway on Plaintiffs' NCEEPA claims.

#### VIII. Plaintiffs' Motion to Strike

Plaintiffs have filed a motion to strike Exhibits 12, 28, 34, and various exhibits documenting hearings of the Employment Security Commission submitted in support of Roadway's motion for summary judgment. Because none of these exhibits is necessary to demonstrate that Plaintiffs cannot sustain a cause of action

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<sup>6</sup>This court already has ruled that Swann cannot state a claim under NCEEPA for constructive discharge. See Swann v. Roadway Express, Inc., 1:02CV01053, No. 15 (M.D.N.C. Nov. 13, 2003) (Order and Judgment granting Defendant's motion for judgment on the pleadings).

under Title VII or NCEPA, Plaintiffs' motion to strike will be denied as moot.

#### CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment will be granted. Plaintiffs' motion to strike will be denied as moot.

An order and judgment in accordance with this memorandum opinion shall be filed contemporaneously herewith.

  
United States District Judge

May 14<sup>th</sup>, 2004